

PRACTICES AND PROCEDURES OF JUDGE D. BROOKS SMITH

I. GENERAL MATTERS

A. Communications with the Court

Judge Smith encourages the use of correspondence with the Court, in lieu of formal motions, regarding discovery matters, extensions of time within which to file documents or the continuation of matters other than trials and hearings.

B. Communications with Law Clerks

The Judge permits communications with the law clerks regarding scheduling and administrative matters. The Judge does not permit inquiries concerning the status of pending decisions and his staff will not entertain such inquiries.

C. Telephone Conferences

The Judge prefers to have face-to-face meetings with counsel wherever feasible regarding matters of substance. Nevertheless, the Judge is more than willing to allow counsel to participate in conferences by telephone, particularly regarding single issue matters and those in which out-of-town counsel is involved.

D. Pro Hac Vice Admissions

The Judge prefers written motions to admit counsel pro hac vice.

E. Comment to the Media

The Judge has no policy regarding comment about a pending case to the media other than that counsel conduct themselves in accordance with applicable rules of conduct. He strongly believes, however, that legal claims are most effectively argued in the judicial forum where they will ultimately be resolved.

II. MOTIONS PRACTICE

A. Oral Argument

The Judge generally schedules oral argument only for selected dispositive motions where argument will be useful. Otherwise, the Judge disposes of motions on the papers.

B. Briefs

The Judge's Local Rule 16.1.2 Order (attached) sets forth the requirements with respect to briefing discovery motions and motions for summary judgment. Beyond the provisions of that order, the Court also requires briefs in support of all dispositive motions. While the Court's Order does not contemplate reply briefs, the court will accept them. However, no further briefing on any motion beyond a reply brief will be accepted. The Judge encourages counsel to utilize "letter briefs" with respect to routine matters, particularly those relating to discovery.

C. **Chambers Copies of Motion Papers**

The Judge discourages counsel to serve chambers copies of briefs regarding contested matters, and he does not want any chambers copies of moving papers or opposition papers.

D. **Scheduling**

The Judge requires that responses to discovery motions be filed within five days and that responses to motions for summary judgment be filed within twenty days. With respect to other motions, the Judge generally requires responses to nondispositive motions within five days and as to dispositive motions, within twenty days. Generally all motions should be accompanied by briefs or letters explaining the reasons for the motion.

E. **Magistrate Judge's Report and Recommendation**

The Judge refers mostly prisoners' litigation and Social Security cases to magistrates. Other matters are referred on a case-by-case basis.

F. **Evidentiary Hearings**

The Judge generally schedules pretrial hearings with respect to criminal suppression matters in advance of the trial date.

G. **In Limine Motions**

The Judge prefers that motions in limine be filed in advance of trial and will consider them prior to trial.

III. **CIVIL CASES**

A. **Pretrial Procedures**

1. **Local Rule 16.1**

A copy of Judge Smith's standard Local Rule 16.1.2 Order follows this summary. (Exhibits III.A.1.- 1 and III.A.1.-2.)

2. **Pretrial Conferences**

The Judge generally schedules both a standard Rule 16 conference early in the case as well as a pretrial conference at the end of discovery. The Judge requires that trial counsel attend both the Rule 16 and the pretrial conference.

3. **Settlement**

Frequently, the Judge schedules a settlement conference on his own motion. The Judge will always entertain a request by the parties for a settlement conference if both parties indicate that one would be beneficial. When a settlement conference is scheduled, the Judge requires that both trial counsel and representatives of the party with actual settlement authority attend the conference in person.

Where a non-jury trial has been demanded, the Judge refers settlement conferences, if scheduled, to another member of the bench. Occasionally, if all counsel are in accord and request it, the Judge will personally conduct a limited settlement conference in non-jury cases.

In complex cases of a business nature, the Judge has had beneficial experiences with the use of “mini trials” and is open to discussions concerning their use as well as any other ADR proceedings that the parties wish to discuss.

4. **Extensions and Continuances**

The Judge does not encourage the request for continuances and extensions. With respect to requests to extend discovery, the Judge will entertain one request to extend the discovery period if the request is made in advance of the scheduled dose of discovery, provided the parties have pursued discovery with some diligence. All such motions should include a proposed order which sets forth a new pretrial schedule, including all necessary dates.

B. **Discovery Matters**

1. **Length of Discovery Period and Extensions**

The Judge establishes the discovery period in consultation with counsel at the initial Rule 16 conference and will rarely schedule a discovery period of less than 120 days or more than 180 days. Provided that the parties have pursued discovery with some diligence, the Judge will entertain one motion to extend the discovery period if the request is made in advance of the scheduled dose of discovery.

2. **Expert Witnesses**

The Judge has no general policy with respect to deposing expert witnesses beyond the provisions of Rule 26.

3. **Deposition Disputes**

The Judge encourages counsel to contact him by telephone during the course of a deposition if a genuine dispute exists and its immediate resolution will advance the discovery process.

4. **Stay of Discovery**

The Judge does not automatically stay discovery during the pendency of dispositive motions. However, the Court will entertain a request for a stay in such situations.

5. **Limitations on Discovery**

During the Rule 16 conference, the Judge will develop specific limits with respect to the number of interrogatories that may be propounded by the parties

as the nature of the case dictates.

6. **Rule 11 Motions - Rule 37 Sanctions**

The Court expects that Rule 11 and Rule 37 motions will be filed only in the most egregious of circumstances and he will defer entertaining them until the resolution of the underlying motion or discovery issue.

C. **Injunctions and TROs**

Where a preliminary injunction hearing has been scheduled, the Judge encourages counsel to consult with his staff to review the nature, length and requirements of the proceeding.

D. **Trial Procedures**

1. **Scheduling of Cases**

Judge Smith schedules trial only at or after the pretrial conference. The Judge generally issues separate trial lists for his Pittsburgh and Johnstown dockets. These lists usually do not set forth dates certain for trial. As the list progresses, trials are frequently designated as primary or back-up trials, and are given a specific date. The trial list is generally issued at least one month in advance of the first trial date.

Vacations of counsel and previously scheduled proceedings in other courts are always acceptable bases for requesting the removal of a case from a trial list. As to conflicting court schedules, the Judge generally looks to the first proceeding scheduled to a date certain as to the one which takes precedence.

2. **Trial Hours/Days**

The Judge generally conducts jury trials from 9:00 a.m. until 5:00 p.m., Mondays through Fridays. Non- jury matters are frequently scheduled to begin earlier than 9:00 a.m.

3. **Trial Briefs**

The Judge requires trial briefs in all jury trials but does not require them in non-jury trials. In non-jury trials the Judge requires proposed findings of fact and conclusions of law. Both trial briefs and proposed findings of fact and conclusions of law must be filed in advance of the trial date.

The Judge also requires the parties to formulate a joint stipulation regarding the matters to be tried. A standard form stipulation follows this summary. (Exhibit III.A.1.-2.)

4. **Voir Dire**

The Judge entertains motions for supplemental voir dire questions in advance of

the voir dire date in all actions. The Judge is always present during the conduct of voir dire in criminal actions and either the Judge or a deputy is present during voir dire in civil actions. Counsel are not permitted to conduct the voir dire; however the Judge will permit counsel to pose additional questions when further interrogation regarding a specific answer is necessary.

5. **Notetaking by Jurors**

The Judge occasionally permits the taking of notes by jurors during a jury trial. In such cases, the Judge closely controls the notetaking. For example, notetaking is prohibited during closings, and the Court collects the juror notebooks at the conclusion of each day's proceedings. The jury is permitted to take their notes with them during deliberations.

6. **Side Bars**

The Judge seeks to carefully limit the number of side bar conferences by meeting with counsel both before and after each day's session of a jury trial. However, when necessary, the Judge does permit limited side bar discussions.

7. **Examination of Witnesses Out of Sequence**

The Judge will entertain requests for the examination of witnesses out of sequence in exceptional circumstances consistent with the orderly proceedings of trial.

8. **Opening Statements and Summations**

The Judge rarely imposes strict time limitations on counsel with respect to opening statements and summations but seeks to determine the estimate of both by counsel and to discuss the propriety of such times.

9. **Examination of Witnesses or Argument by More Than One Attorney**

When more than one attorney appears for a party in an action, the Judge requires that lead counsel be identified and that the general division of labor between the attorneys be explained. The Judge will not permit more than one attorney to examine any witness.

10. **Examination of Witnesses Beyond Direct and Cross**

The Judge generally permits redirect, recross and further examination as necessary. All examination beyond cross-examination will generally be limited to the scope of the immediately preceding examination.

11. **Videotaped Testimony**

The Judge requires that the parties confer with respect to any objections to the use or substance of any videotaped testimony and that these objections be brought to the Court's attention in advance of trial.

12. **Reading of Material into the Record**

The Judge requires that the parties serve notice of any materials to be read into the record at trial, that the parties confer with respect to any objections regarding such material, and that any such objections be brought to the Court's attention in advance of trial.

13. **Exhibits**

The Judge requires that the parties mark and exchange all exhibits to be used in a trial in advance of the same, that they confer and stipulate to the authenticity and admissibility of such exhibits, and that they advise the Court of the results of those conferences. The Judge has no special rules regarding the use of visual aids during trial or opening statements other than that summaries comply with F.R.E. 1006, as appropriate.

14. **Directed Verdict Motions**

The Judge has no special requirements with respect to directed verdict motions or motions to dismiss in non-jury trials.

15. **Jury Instructions and Verdict Forms**

The Judge does not use any standard compilation of jury instructions. The Judge requires counsel to submit proposed jury instructions and any proposed special verdict forms in advance of trial where possible, but always prior to the close of proceedings.

16. **Proposed Findings of Fact and Conclusions of Law**

The Judge requires proposed findings of fact and conclusions of law be filed in advance of non-jury trials.

17. **Offers of Proof**

The Judge encourages that all matters relating to offers of proof be raised in chambers at the beginning or at the end of each jury trial day. The Judge notes that offers of proof should actually disclose the testimony that is to be offered rather than merely outline the subject matter of the offered proof.

18. **General Courtroom Rules**

The Judge does not have any formal rules governing courtroom procedure other than common courtesy. The Judge notes that counsel must avoid interrupting the Court, opposing counsel and witnesses in order to enable the reporter to take down a clear record.

E. **Jury Deliberations**

1. **Written Jury Instructions**

The Judge generally gives the jury a copy of his instructions to take into the jury

room.

2. **Exhibits in the Jury Room**

The Judge generally sends all admitted exhibits with the jury to the jury room other than duplicative exhibits and exhibits containing any inadmissible hearsay. Once the jury has retired, the Judge reviews with counsel, on the record, the admitted exhibits to ensure that the jury has a complete set.

3. **Jury Requests to Read Back Testimony or Replay Tapes During Deliberations**

The Judge will entertain requests from the jury to have the tapes of wire taps replayed for it; if the court agrees to such a request, it is always conducted in open court.

4. **Jury Questions**

The Judge does not permit the jurors to propose questions during the course of trial. When jury questions are delivered to the judge from the deliberation room, the Judge consults with counsel regarding the question and seeks to develop a consensus regarding the response. Answers to jurors questions are given in open court.

5. **Availability of Counsel During Jury Deliberations**

The Judge prefers that counsel remain available in the courthouse during jury deliberations, but always requires that counsel be immediately available by a single phone call. In instances where counsel must leave the courthouse, it is counsels' responsibility to advise the Judge's staff where they can be reached.

6. **Interviewing the Jury**

The Judge has no specific rules regarding interviewing of jurors post-verdict; however, the Judge will protect the jurors as they may request from unwanted contact.

F. **General**

1. **Special Types of Cases**

The Judge issues a form case order regarding briefing of Social Security actions and requires the filing of a RICO Case Statement in every RICO action.

2. **Other Individual Practices/Procedures**

All objections should be stated orally and with as much detail as possible including, where appropriate, citation to the appropriate rule.

IV. **CRIMINAL CASES**

A. **Motions**

The Judge has no standard practice or position regarding motions for extensions of time to file pretrial motions in criminal matters.

B. Pretrial Conferences

The Judge generally does not schedule pretrial conferences in criminal cases unless the case is extremely complicated.

C. Guilty Pleas

The Judge does not have any special rules regarding guilty pleas nor any standard deadline for accepting or rejecting plea bargains. The Judge follows a form guilty plea colloquy, a copy of which follows this summary. (Exhibit IV.C.)

D. Voir Dire

The Judge entertains motions for supplemental voir dire questions in advance of the voir dire. The Judge is always present during the conduct of voir dire in criminal cases, and conducts that examination himself. The Judge will permit counsel to pose additional questions when further interrogation regarding a specific answer is necessary.

E. Trial

In cases where more than one attorney appears for a party, the Judge requires that lead counsel be identified and the general division of the labor between the attorneys be explained. The Judge will not permit more than one attorney to examine any witness.

The Judge enforces F.R.E. 615 pursuant to its express terms regarding requests for sequestration of witnesses.

Where appropriate, the Judge does permit the use of transcripts in cases where the government introduces tape-recorded conversations, with the specific instruction to the jury that the same is provided merely as an aid to listening and that the tape itself is the evidence to be considered.

F. Sentencing Memoranda

The Judge permits the use of sentencing memoranda and prefers to see them in advance of the sentencing hearing.

G. Sentencing Conference

The Judge does not generally hold a sentencing conference for cases under the Sentencing Guidelines prior to the imposition of sentence nor does the Judge customarily issue tentative fact findings and rulings on Sentencing Guidelines.

H. Other General Practices and Procedures

The Judge prefers that Jencks material be provided at the beginning of trial rather than during the course of the trial, where possible.

In an appropriate case, if requested, the Judge will entertain requests for recommendations to the Bureau of Prisons regarding the federal institution to which a defendant should be sent.

V. **BANKRUPTCY CASES**

N/A

VI. **BANKRUPTCY APPEALS (TO THE DISTRICT COURT)**

A. **Filing/Scheduling**

The Judge has no particular requirements regarding the filing or scheduling of bankruptcy appeals.

B. **Oral Argument**

While Judge Smith does not generally schedule them, he will, in appropriate cases, entertain a request for oral argument in bankruptcy appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT ORDER

AND NOW, this _____ day of _____, 2000 an initial case management conference having been held this date pursuant to Fed. R. Civ. P. 16 and LR 16.1, it is hereby

ORDERED that the parties adhere to the following case management order:

1. This action is designated a Track _____ case, pursuant to LR 16.1.2(C).

2. Any motions to amend pleadings or to add new parties shall be filed no later than _____.

3. All discovery shall be completed by _____.
_____. The discovery deadline shall be extended only by leave of court, and upon motion filed prior to the expiration of such deadline. The motion shall: (a) state reasons for the requested extension; (b) list any previous extensions of discovery; and (c) attach a proposed order which establishes specifically the extended pretrial schedule being requested.

4. The total number of written interrogatories, including subparts, submitted by a party to another party shall not exceed _____.

5. Discovery materials shall not be filed with the Clerk consistent with LR 5.5A. However, if such material is necessary to the Court's review of any motion, relevant portions only shall be included with the motion or opposition, or filed separately as an appendix.

6. Discovery Motions Discovery motions shall include a LR 7.1 certification, together with a memorandum of law. The responding party shall file its response within five (5) days. All memoranda on discovery issues shall be limited to five (5) pages. Argument over contested discovery motions will be scheduled as appropriate. **No briefing schedule will issue.**

7. Miscellaneous Motions The response to any miscellaneous motion shall be filed within five (5) days. Argument shall be scheduled as deemed necessary. **No briefing schedule will issue.**

8. Summary Judgment Motions All summary judgment motions shall be filed by _____. Such motion shall be filed with the Clerk of Court, together with any memorandum of law and supporting evidentiary material deemed appropriate. The responding party shall file its responsive memorandum and any supporting evidentiary material within twenty (20) days. The movant shall file its reply brief, if any, within ten (10) days. No further submissions will be permitted. **No briefing schedule will issue.**

All argument in support of or opposition to a summary judgment motion shall be set forth in the accompanying memorandum of law and shall not be included in the motion, or answer to the motion, itself.

9. If a summary judgment motion is filed, **no** pretrial narratives need be filed until ordered by the court. If no summary judgment motions are filed by the deadline set forth above, the plaintiff's pretrial narrative shall be filed by _____, and the defendant's pretrial narrative shall be filed by _____. The pretrial narratives shall conform to the requirements of LR 16.1.4.

BY THE COURT,

D. Brooks Smith
United States District Judge

cc: Counsel of Record

Revised 6/23/98

COLLOQUY FOR WAIVER OF JURY TRIAL AND ENTRY OF GUILTY PLEA

1. THE COURT IS INFORMED THAT YOU WISH TO [CHANGE THE PLEA YOU HAVE PREVIOUSLY ENTERED AT COUNT * TO] [ENTER] A PLEA OF GUILTY. IS THAT CORRECT?

2. BEFORE I ACCEPT YOUR GUILTY PLEA, THERE ARE A NUMBER OF QUESTIONS I WILL ASK YOU TO ASSURE THAT IT IS A VALID PLEA. IF YOU DO NOT UNDERSTAND ANY OF THE QUESTIONS, PLEASE TELL ME SO, AND I WILL EXPLAIN THE QUESTION TO YOU; OR IF AT ANY TIME YOU WISH TO CONSULT WITH YOUR ATTORNEY, TELL ME SO, AND I WILL PROVIDE YOU TIME TO CONSULT WITH YOUR ATTORNEY. I GIVE YOU THESE INSTRUCTIONS BECAUSE IT IS ESSENTIAL TO A VALID PLEA THAT YOU UNDERSTAND EACH QUESTION BEFORE YOU ANSWER.

(Judge):

THE CLERK WILL PLEASE SWEAR THE DEFENDANT.

3. DO YOU UNDERSTAND THAT HAVING BEEN SWORN, YOUR ANSWERS TO MY QUESTIONS ARE SUBJECT TO THE PENALTIES OF PERJURY OR OF MAKING A FALSE STATEMENT IF YOU DO NOT ANSWER TRUTHFULLY?

4. PLEASE STATE YOUR FULL NAME.

5. HOW OLD ARE YOU?

6. HOW FAR DID YOU GO IN SCHOOL?

7. CAN YOU READ, WRITE, AND ARE YOU ABLE TO COMMUNICATE IN THE ENGLISH LANGUAGE?

(Ask defense counsel):

8. HAVE YOU BEEN ABLE TO COMMUNICATE WITH THE DEFENDANT IN ENGLISH?

9. HAVE YOU TAKEN ANY DRUGS OR MEDICATION, OR HAVE YOU CONSUMED ANY ALCOHOLIC BEVERAGES IN THE PAST 24 HOURS?

10. ARE YOU NOW, OR HAVE YOU RECENTLY BEEN, UNDER THE CARE OF A PHYSICIAN OR A PSYCHIATRIST?

11. ARE YOU NOW, OR HAVE YOU RECENTLY BEEN, HOSPITALIZED OR TREATED FOR NARCOTIC ADDICTION?

12. DO YOU UNDERSTAND WHAT IS HAPPENING HERE TODAY? WHAT?

(Ask defense counsel and prosecutor):

13. DO EITHER OF YOU HAVE ANY DOUBT AS TO THE DEFENDANT'S COMPETENCE TO PLEAD AT THIS TIME?

(Judge)

I FIND THE DEFENDANT COMPETENT TO PLEAD.

14. DO YOU HAVE AN ATTORNEY HERE WITH YOU TODAY?

15. WHAT IS YOUR ATTORNEY'S NAME?

16. HAVE YOU HAD AMPLE OPPORTUNITY TO DISCUSS YOUR CASE WITH YOUR ATTORNEY?

17. ARE YOU SATISFIED WITH THE JOB HE/SHE HAS DONE FOR YOU?

18. DO YOU UNDERSTAND THAT IF YOUR PLEA IS NOT GUILTY, YOU HAVE A RIGHT TO BE ASSISTED BY AN ATTORNEY AT THE TRIAL OF [THIS] [THESE] CHARGE(S)?

19. DO YOU UNDERSTAND THAT IF YOU QUALIFY FINANCIALLY, YOU ARE ENTITLED TO BE ASSISTED BY AN ATTORNEY AT NO COST TO YOU AT ALL PHASES OF THE PROCESSING OF [THIS] [THESE] CHARGE(S) AGAINST YOU?

20. DO YOU UNDERSTAND THAT UNDER THE CONSTITUTION AND THE LAWS OF THE UNITED STATES, YOU ARE ENTITLED TO A SPEEDY TRIAL BY A JUDGE AND JURY ON THE CHARGE(S) CONTAINED IN THE INDICTMENT NO.

21. DO YOU UNDERSTAND THAT AT THE TRIAL, YOU WOULD BE PRESUMED TO BE INNOCENT?
22. DO YOU UNDERSTAND THAT AT THE TRIAL, THE GOVERNMENT WOULD BE REQUIRED TO PROVE YOUR GUILT BY COMPETENT EVIDENCE AND BEYOND A REASONABLE DOUBT BEFORE YOU COULD BE FOUND GUILTY?
23. DO YOU UNDERSTAND THAT AT THE TRIAL, YOU WOULD NOT HAVE TO PROVE THAT YOU WERE INNOCENT; INSTEAD, THE GOVERNMENT WOULD BE REQUIRED TO PROVE YOUR GUILT BEYOND A REASONABLE DOUBT?
24. DO YOU UNDERSTAND THAT AT THE TRIAL, THE JURY WOULD HAVE TO BE UNANIMOUS IN ORDER TO FIND YOU GUILTY ON THE CHARGE(S) AGAINST YOU?
25. A. DO YOU UNDERSTAND THAT YOU WOULD HAVE THE RIGHT TO PARTICIPATE WITH YOUR ATTORNEY IN THE SELECTION OF THE JURY?
25. B. DO YOU UNDERSTAND THAT IN SELECTING A JURY YOU WOULD HAVE THE RIGHT TO STRIKE OR ELIMINATE ANY PROSPECTIVE JUROR IF IT WAS DEMONSTRATED THAT THAT JUROR OR WAS UNABLE TO RENDER A FAIR AND IMPARTIAL VERDICT? (THESE ARE WHAT ARE KNOWN AS CHALLENGES FOR CAUSE)?
26. A. DO YOU UNDERSTAND THAT, IN ADDITION, YOU * (AND YOUR CO-DEFENDANT) WOULD HAVE THE RIGHT TO STRIKE OR ELIMINATE *TEN PROSPECTIVE JURORS WITHOUT ASSIGNING ANY REASON AT ALL (THESE ARE WHAT ARE CALLED PEREMPTORY CHALLENGES)? *(capital offense: 20 peremptories; felonies: 10 peremptories; minor offenses: 3 peremptories. Fed.R.Crim.P. 24(b).)*
26. B. DO YOU UNDERSTAND THAT IN THE COURSE OF THE TRIAL, THE WITNESSES FOR THE GOVERNMENT WOULD HAVE TO COME TO COURT AND THEY WOULD HAVE TO TESTIFY IN YOUR PRESENCE?
27. DO YOU UNDERSTAND THAT IN THE COURSE OF TRIAL, YOUR ATTORNEY COULD CROSS-EXAMINE THE WITNESSES CALLED BY THE GOVERNMENT, OBJECT TO EVIDENCE OFFERED BY THE GOVERNMENT; AND OFFER EVIDENCE ON YOUR BEHALF?
28. DO YOU UNDERSTAND THAT, IF YOU QUALIFY AS BEING FINANCIALLY UNABLE TO PAY WITNESS FEES TO WITNESSES YOU WISH TO CALL ON YOUR BEHALF DURING THE COURSE OF THE TRIAL, THE GOVERNMENT WOULD PAY THOSE WITNESS FEES?
29. DO YOU UNDERSTAND ALSO THAT AT A TRIAL, YOU WOULD HAVE THE RIGHT TO TESTIFY IF YOU CHOSE TO DO SO?
30. DO YOU UNDERSTAND THAT AT A TRIAL, YOU ALSO WOULD HAVE THE RIGHT NOT TO TESTIFY, AND IF YOU CHOSE NOT TO TESTIFY, NO INFERENCE OR SUGGESTION OF GUILT COULD BE DRAWN BY THE JURY FROM THE FACT THAT YOU DID NOT TESTIFY?
31. IF YOU PLEAD GUILTY AND I ACCEPT YOUR PLEA, DO YOU UNDERSTAND THAT YOU WILL WAIVE YOUR RIGHT TO A TRIAL AND THE OTHER RIGHTS I HAVE JUST DISCUSSED, THERE WILL BE NO TRIAL, AND I WILL ENTER A JUDGMENT OF GUILTY AND SENTENCE YOU ON THE BASIS OF YOUR GUILTY PLEA AFTER CONSIDERING A PRE-SENTENCE REPORT?
32. IF YOU PLEA GUILTY, DO YOU UNDERSTAND THAT YOU WILL ALSO HAVE TO WAIVE YOUR RIGHT NOT TO INCRIMINATE YOURSELF, AS IT PERTAINS TO THESE CHARGES, SINCE I MAY ASK YOU QUESTIONS ABOUT WHAT YOU DID IN ORDER TO SATISFY MYSELF THAT YOU ARE GUILTY AS CHARGED, AND YOU WILL HAVE TO ACKNOWLEDGE YOUR GUILT?
33. HAVING HEARD THESE RIGHTS EXPLAINED TO YOU, DO YOU STILL WANT TO PLEAD GUILTY?
34. HAVE YOU RECEIVED A COPY OF THE INDICTMENT NAMING YOU AS A DEFENDANT? HAVE YOU DISCUSSED WITH YOUR COUNSEL THE CHARGE(S) IN THE INDICTMENT TO WHICH YOU INTEND TO PLEAD GUILTY?
35. DO YOU UNDERSTAND THE CHARGE(S)?
36. DO YOU UNDERSTAND THAT YOU ARE CHARGED IN COUNT * WITH, *?
(Review elements of each offense)

**(Note: If overt acts are involved, state as follows: SPECIFICALLY, DO YOU UNDERSTAND THAT, AS OVERT ACTS OF THE CONSPIRACY, IT IS CHARGED THAT ...) (Note: overt acts are charged as part of conspiracy counts. However, overt acts are not requisite to conviction for drug conspiracy. 21 U.S.C. §846; US v. Dreyer, 533 F.2d 112 (3d Cir.1976)).*

37. DO YOU ADMIT YOUR GUILT TO EACH OF THE ELEMENTS OF THE CHARGE OF _____?

(If Sentencing Guidelines are applicable (for offenses after 11/1/87—insert the following):

38. A. DO YOU UNDERSTAND THAT BECAUSE THE OFFENSE* WITH WHICH YOU ARE CHARGED IN COUNT * OCCURRED AFTER NOVEMBER 1, 1987, THE GUIDELINES PROMULGATED BY THE UNITED STATES SENTENCING COMMISSION WOULD APPLY TO ANY SENTENCE I WOULD IMPOSE AT COUNT *?

B. HAVE YOU AND YOUR ATTORNEY DISCUSSED HOW THE GUIDELINES MIGHT APPLY IN YOUR CASE?

C. DO YOU UNDERSTAND THAT I WILL NOT BE ABLE TO DETERMINE THE ACTUAL GUIDELINE SENTENCE FOR YOUR CASE UNTIL AFTER THE PRESENTENCE REPORT HAS BEEN COMPLETED AND YOU AND THE GOVERNMENT HAVE HAD AN OPPORTUNITY TO CHALLENGE THE FACTS REPORTED BY THE PROBATION OFFICER?

D. DO YOU ALSO UNDERSTAND THAT, AFTER IT HAS BEEN DETERMINED WHAT GUIDELINE APPLIES TO A CASE, THE JUDGE HAS THE AUTHORITY IN SOME CIRCUMSTANCES TO IMPOSE A SENTENCE THAT IS MORE SEVERE OR LESS SEVERE THAN THAT CALLED FOR BY THE GUIDELINES?

E. DO YOU ALSO UNDERSTAND THAT YOU OR THE GOVERNMENT MAY HAVE THE RIGHT TO APPEAL ANY SENTENCE THAT I IMPOSE?

F. DO YOU ALSO UNDERSTAND THAT UNDER THE GUIDELINES, PAROLE HAS BEEN ABOLISHED, AND THAT IF YOU ARE SENTENCED TO PRISON AT COUNT *, YOU WILL NOT BE ELIGIBLE FOR PAROLE AS TO THAT COUNT? *(Note: parole also may be abolished by the substantive offense penalty provisions. See, e.g., 21 U.S.C. §841. If this is the case, advise the defendant of this fact in connection with the questions relating to the maximum possible penalty at question 37 of this colloquy infra, rather than at this point.)*

G. DO YOU UNDERSTAND THAT IF THE SENTENCE IMPOSED IS MORE SEVERE THAN YOU EXPECTED, YOU WILL STILL BE BOUND BY YOUR PLEA OF GUILTY, AND YOU WILL HAVE NO RIGHT TO WITHDRAW IT SIMPLY BECAUSE YOU ARE DISAPPOINTED IN THE SENTENCE YOU RECEIVED?

38. A. DO YOU UNDERSTAND THAT THE MINIMUM PENALTY TO COUNT * IS *?

B. DO YOU UNDERSTAND THAT THE MAXIMUM PENALTY TO COUNT * IS *? *(If a supervised release term is required by the statute prescribing the penalty for the substantive offense, the maximum possible penalty to list is "...a term of supervised release of life...", even if the statute states, for example, "a term of supervised release of at least three years....").*

C. *(If applicable: see drug penalties, 21 U.S.C. §841):* DO YOU FURTHER UNDERSTAND THAT YOU WILL NOT BE ELIGIBLE FOR PAROLE DURING THE TERM OF ANY IMPRISONMENT IMPOSED UNDER COUNT *?

D. *(If applicable, see drug penalties 21 U.S.C. §841):* DO YOU FURTHER UNDERSTAND THAT THIS COURT HAS NO DISCRETION TO PLACE YOU ON PROBATION OR SUSPEND ANY SENTENCE IMPOSED UNDER COUNT *?

E. *(If the offense occurred prior to November 1, 1987, and a special parole term/term of supervised release applies):* IF YOU WERE TO VIOLATE THE TERMS OF THE TERM OF SUPERVISED RELEASE (SPECIAL PAROLE TERM) THE ORIGINAL TERM OF IMPRISONMENT WOULD BE INCREASED BY THE PERIOD OF THE TERM OF SUPERVISED RELEASE (SPECIAL PAROLE TERM) AND THE RESULTING NEW TERM OF IMPRISONMENT WOULD NOT BE DIMINISHED BY THE TIME YOU HAD ALREADY SPENT ON THE TERM OF SUPERVISED RELEASE (SPECIAL PAROLE TERM.) DO YOU UNDERSTAND THAT? DO YOU UNDERSTAND THAT IF YOUR TERM OF SUPERVISED RELEASE (SPECIAL PAROLE TERM) WERE REVOKED, YOU COULD BE REQUIRED TO SERVE ALL OR PART OF THE REMAINDER OF THE NEW TERM?

F1. *(For cases covered by the Sentencing Guidelines in which the statute prescribing the penalty for the substantive offense does not provide for a term of supervised release, the Guidelines will require imposition of a term of supervised release in many cases. See 18 U.S.C. §3583, which says the Court "may" impose one, though. Just a note of a legal issue which will probably be raised by someone, re: could Commission make term of supervised release mandatory when Congress only made it discretionary? See Chapter 5, Part D of Guidelines Manual. In such cases, state the following):* DO YOU UNDERSTAND THAT IN ADDITION TO THE MAXIMUM PENALTY THAT I HAVE DESCRIBED FOR YOU, UNDER THE SENTENCING GUIDELINES, IF I WERE TO IMPOSE A SENTENCE OF IMPRISONMENT OF MORE THAN ONE YEAR AT COUNT *, THE COURT WOULD BE REQUIRED TO IMPOSE A MINIMUM TERM OF SUPERVISED RELEASE OF * YEARS AND COULD IMPOSE A MAXIMUM TERM OF * YEARS?

F2. DO YOU UNDERSTAND THAT IF YOU WERE TO VIOLATE THE TERMS OF THE SUPERVISED RELEASE, THE COURT WOULD REVOKE THE SUPERVISED RELEASE, YOU WOULD BE INCARCERATED, AND

NO CREDIT WOULD BE GIVEN FOR THE TIME YOU PREVIOUSLY HAD SERVED ON THE TERM OF SUPERVISED RELEASE?

G. *(Used if pleading to multiple counts with minimum sentences):* DO YOU UNDERSTAND THAT THE TOTAL MINIMUM SENTENCE ON THE COUNTS TO WHICH YOU ARE PLEADING IS *?

H. *(If multiple counts with minimum sentences are involved and sentence on some counts could run concurrently):* ALTHOUGH THIS IS THE TOTAL MINIMUM SENTENCE, YOU SHOULD UNDERSTAND THAT THE SENTENCES IMPOSED AT COUNT * AND COUNT * COULD BE CONCURRENT AND THAT, THEREFORE, THE TOTAL MINIMUM YEARS OF INCARCERATION COULD BE*.

I. *(Use in all multiple count situations):* DO YOU UNDERSTAND THAT THE TOTAL MAXIMUM SENTENCE ON THE COUNTS TO WHICH YOU ARE PLEADING IS*?

J. *(If Victim and Witness Protection Act is applicable (Title 18 offenses only)):* DO YOU UNDERSTAND THAT IN ADDITION TO THE MAXIMUM PENALTY ALREADY DESCRIBED FOR YOU, YOU MAY BE ORDERED TO MAKE RESTITUTION TO ANY VICTIM OF THE OFFENSE PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3663 (formerly 3579), THE VICTIM PROTECTION ACT, APPLICABLE TO OFFENSES OCCURRING AFTER JANUARY 1, 1983?

K. *(If Victim and Witness Protection Act is not applicable, the Court still has authority to order restitution as a condition of probation, pursuant to 18U.S.C. §3651 (assuming probation is a possibility for the offense defendant is pleading to). §3651 was repealed as part of the Comprehensive Crime Control Act of 1984, EFFECTIVE NOV. 1, 1987. Advise the defendant accordingly as follows):* DO YOU UNDERSTAND THAT IN ADDITION TO THE PENALTY ALREADY DESCRIBED FOR YOU, YOU MAY BE ORDERED TO MAKE RESTITUTION PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3651, IN THE EVENT I WERE TO PLACE YOU ON PROBATION?

(If the plea relates to a felony offense): 40. DO YOU UNDERSTAND THAT THE OFFENSE* TO WHICH YOU ARE PLEADING GUILTY IS A FELONY OFFENSE; THAT IF YOUR PLEA IS ACCEPTED, YOU WILL BE ADJUDGED GUILTY OF THE OFFENSE*; AND THAT SUCH ADJUDICATION MAY DEPRIVE YOU OF VALUABLE CIVIL RIGHTS, SUCH AS THE RIGHT TO VOTE, THE RIGHT TO HOLD PUBLIC OFFICE, THE RIGHT TO SERVE ON A JURY, AND THE RIGHT TO POSSESS ANY KIND OF FIREARM?

41. HAS ANYONE MADE A THREAT TO YOU OR TO ANYONE ELSE THAT HAS FORCED YOU IN ANY WAY TO PLEAD GUILTY?

42. YOU SHOULD UNDERSTAND THAT THIS COURT MAY OR MAY NOT APPROVE ANY PLEA AGREEMENT WHICH YOU MIGHT ENTER INTO. YOU HAVE A DUTY TO DISCLOSE ANY SUCH AGREEMENT. IF YOU DO NOT DISCLOSE THE AGREEMENT NOW, YOU MAY NOT LATER CLAIM THE EXISTENCE OF ANY PLEA NEGOTIATION OR AGREEMENT.

43. HAS THERE BEEN ANY PLEA AGREEMENT ENTERED INTO BETWEEN YOU AND YOUR ATTORNEY AND THE ATTORNEY FOR THE GOVERNMENT?

(If yes):

44. (A) WHAT IS THE SUBSTANCE OF THAT PLEA AGREEMENT?

(Judge—ask prosecutor and defense counsel):

45. DO THE GOVERNMENT AND DEFENSE COUNSEL AGREE THAT THE SUBSTANCE OF THE PLEA AGREEMENT HAS BEEN CORRECTLY STATED?

(Judge, if the plea agreement has been reduced to writing, have it marked as an exhibit.)

46. HAS ANYONE MADE ANY PROMISE OTHER THAN THE PLEA AGREEMENT THAT INDUCED YOU TO PLEAD GUILTY?

(If yes):

47. WHAT WAS THAT PROMISE?

(Judge—NOTE: If the plea agreement involves only a recommendation of sentence or an agreement that the prosecution will not oppose the defendant's request for a particular sentence, as the following):

48a. DO YOU UNDERSTAND THAT ANY RECOMMENDATION OF SENTENCE AGREED TO BY YOUR COUNSEL AND THE GOVERNMENT OR ANY AGREEMENT NOT TO OPPOSE YOUR ATTORNEY'S REQUESTED SENTENCE IS NOT BINDING ON THE COURT AND THAT YOU MIGHT ON THE BASIS OF YOUR GUILTY PLEA RECEIVE UP TO THE MAXIMUM PERMITTED BY LAW? DO YOU UNDERSTAND THAT IF I DECLINE TO IMPOSE THE SENTENCE RECOMMENDED BY THE PROSECUTOR AND YOUR COUNSEL AND IMPOSE A MORE SEVERE SENTENCE, YOU WILL NOT, THEREFORE, BE ENTITLED TO WITHDRAW A GUILTY PLEA?

(Judge—Note: If the plea agreement involves the dismissal of one or more charges and/or an agreement that a specific sentence is the appropriate disposition of the case, ask the following):

48b. DO YOU UNDERSTAND THAT THE COURT IS NOT REQUIRED TO ACCEPT THE PLEA AGREEMENT WHICH YOU HAVE ENTERED INTO AND MY REJECT IT? IF THE COURT REJECTS THE PLEA AGREEMENT, YOU WILL BE ADVISED IN OPEN COURT AND WILL HAVE THE OPPORTUNITY TO WITHDRAW YOUR GUILTY PLEA. IF THE PLEA AGREEMENT IS REJECTED, YOU MAY NEVERTHELESS CONTINUE YOUR PLEA OF GUILTY AND IF YOU PERSIST IN YOUR GUILTY PLEA AFTER THE PLEA AGREEMENT IS REJECTED, YOUR SENTENCE OR THE DISPOSITION OF THIS CASE MAY BE LESS FAVORABLE TO YOU THAN THAT PROPOSED IN THE PLEA AGREEMENT. DO YOU UNDERSTAND?

*(Use if there is no minimum sentence):

49. HAS ANYONE MADE ANY PREDICTION OR PROMISE TO YOU AS TO WHAT YOUR SENTENCE WILL BE?

(If yes):

50. WHAT WAS IT AND WHO MADE IT?

*(Use if there is a minimum sentence):

51. HAS ANYONE MADE ANY PREDICTION OR PROMISE TO YOU AS TO WHAT YOUR SENTENCE WILL BE OTHER THAN WHAT YOU HAVE BEEN TOLD AS A MINIMUM SENTENCE?

(If yes):

52. WHAT WAS IT AND WHO MADE IT?

*(Use if there is no minimum sentence):

53. HAS ANYTHING I HAVE SAID HERE TODAY SUGGESTED TO YOU WHAT YOUR ACTUAL SENTENCE WILL BE?

54. HAVE YOU BEEN INSTRUCTED BY YOUR COUNSEL, GOVERNMENT COUNSEL, OR ANYONE ELSE TO RESPOND UNTRUTHFULLY TO ANY QUESTION CONCERNING A PROMISED SENTENCE?

55. DID YOU, AS CHARGED IN COUNT", "?

*(Note: if overt acts are involved, state as follows):

SPECIFICALLY, DID YOU CONSPIRE WITH OTHERS IN A CONSPIRACY IN WHICH YOU AND/OR YOUR CO-CONSPIRATORS COMMITTED THE FOLLOWING OVERT ACTS: (LIST ACTS).

(Ask Prosecutor):

56. WHAT IN SUMMARY WOULD BE THE GOVERNMENT'S EVIDENCE AS TO "THIS COUNT"?

57. Do you agree with the Government's summary of what you did?

(If no):

58. With what do you disagree?

59. Do you still wish to plead guilty?

(Ask defense counsel):

60. Is this consistent with your advice?

(Judge): Since you acknowledge that you are in fact guilty as charged in count", since you know your right to a trial, since you know what the "minimum possible penalty is, since you know what the maximum possible penalty is, and since you are voluntarily pleading guilty, I will accept your guilty plea and enter a judgment of guilty on your plea.